

Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/2022 1

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
Charlottesville Division

-----  
LORI FITZGERALD, et al, )  
Plaintiffs, ) CIVIL ACTION NO.  
v. ) 3:20cv44  
JOSEPH WILDCAT, SR., et al, )  
Defendants. )  
-----

TRANSCRIPT OF PROCEEDINGS  
(VIDEOCONFERENCE MOTIONS HEARING)

Charlottesville, Virginia  
September 21, 2022

BEFORE: THE HONORABLE NORMAN K. MOON  
Senior United States District Judge

APPEARANCES:

FOR THE PLAINTIFFS:

ANDREW JOSEPH GUZZO  
KRISTI CAHOON KELLY  
Kelly Guzzo, PLC  
3925 Chain Bridge Road, Suite 202  
Fairfax, VA 22030  
703.424.7576

FOR THE DEFENDANTS:

PATRICK MCANDREWS  
Spencer Fane, LLP  
13815 FNB Parkway, Suite 200

Cynthia L. Bragg, Official Court Reporter

Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/2022 2

1 Omaha, NE 68154  
402.965.8600

2 ANDREW ADAMS, III  
3 Hogan Adams PLLC  
4 1935 County Road B2 W, Suite 460  
5 St. Paul, MN 55113  
651.842.9100

6 JOHN EDWARD KOMISIN  
7 Troutman Pepper Hamilton Sanders LLP  
8 1001 Haxall Point, Suite 1500  
9 Richmond, VA 23219  
804.697.1872

10 \* \* \* \* \*

11 (Proceedings commenced at 2:00 p.m.)

12 THE COURT: All right. Are all the parties on the  
13 call?

14 THE CLERK: Yes, Judge.

15 THE COURT: All right. You may call the case.

16 THE CLERK: Lori Fitzgerald and others v. Joseph  
17 Wildcat, Sr., and others, case number 3:20cv44.

18 THE COURT: Are the plaintiffs ready?

19 MR. GUZZO: Yes, Your Honor.

20 THE COURT: Are the defendants ready?

21 MR. MCANDREWS: Yes, Your Honor.

22 THE COURT: Okay. We're here on the defendants'  
23 motion, so, counsel, whoever is going to be first, may  
24 proceed.

25 MR. MCANDREWS: Your Honor, this is Patrick

Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/2022 3

1 McAndrews from Spencer Fane, and I'm going to be talking on  
2 behalf of all the defendants in this case.

3 THE COURT: Good afternoon.

4 MR. MCANDREWS: Good afternoon. We're here, again,  
5 on defendants' Motion to Dismiss, Motion to Compel  
6 arbitration, and to strike class claims.

7 Defendants are three individuals associated with the  
8 Lac du Flambeau Band of the Lake Superior Chippewa Indians.  
9 The tribe is a federally-recognized Indian tribe, and it has  
10 a reservation in a remote section of northern Wisconsin.

11 With that remoteness comes limited resources and job  
12 opportunities. So in order to rectify that, the tribe  
13 started the LDF or the Lac du Flambeau Business Development  
14 Corp. I'll refer to that as the LDF Bs. Corp. throughout  
15 this hearing.

16 What LDF Bs. Corp. does is they act as the holding  
17 company for all the tribes non-gaming businesses. This  
18 includes a construction company, a campgrounds, the tribe or  
19 the reservation's only grocery store, the tribe's vocational  
20 school, and finally, the tribe's lending business known as  
21 LDF Holdings.

22 Now, LDF Holdings was established by the tribe, and  
23 it holds about 20 different lending subsidiary tribal  
24 companies, and those tribal entities provide online short  
25 term loans for customers. LDF Holdings employs roughly 50

1 people on the reservation.

2 The plaintiffs are Virginia and Georgia residents  
3 who entered loan agreements and took out loans with one of  
4 LDF Holding's tribal lending subsidiary companies.

5 Now, at this point you're probably wondering why the  
6 tribe or the company that actually loaned the money to  
7 plaintiffs are not named in this lawsuit. Plaintiffs, in an  
8 attempt to avoid the argument of tribal sovereign immunity,  
9 have essentially plucked three individuals who were either  
10 associated with the tribe, the tribal council, or the lending  
11 business and has brought RICO claims against these  
12 individuals. That, Your Honor, is the fundamental and fatal  
13 problem with the plaintiffs' lawsuit.

14 Now, the three defendants in this case, and the only  
15 defendants in this case, are individuals. The first  
16 individual defendant is Joseph Wildcat. Mr. Wildcat was the  
17 former president of the tribal council, which is the  
18 governing body of the tribe. He's being sued in both his  
19 official and individual capacity.

20 The second defendant is Nicole Reynolds-Chapman, and  
21 she's the former president of the board of the LDF Business  
22 Development, Corp., which is, again, the holding company for  
23 all of the tribe's non-lending businesses, and she's being  
24 sued in her individual capacity.

25 The final defendant is Jessi Lorenzo, and she is the

1 former president of LDF Holdings, which is one of the  
2 subsidiaries under the LDF Business Development, Corp., and  
3 she is being sued in her individual capacity.

4 Now, as I stated earlier, plaintiffs have brought a  
5 RICO cause of action alleging that defendants Wildcat,  
6 Reynolds, and Lorenzo individually conspired to collect  
7 unlawful debt under 18 USC 1964.

8 They also allege that these individual defendants  
9 conspired to operate an enterprise to issue and collect loans  
10 in violation of state lending laws. Plaintiffs have also  
11 brought a declaratory judgment action asking the Court to  
12 find all of the loans issued by the LDF tribal lending  
13 subsidiaries to be void as a matter of law.

14 Finally, this is styled as a class complaint in that  
15 plaintiffs are seeking to certify a nationwide class of  
16 borrowers who took out loans with one of the 20 LDF Holding  
17 tribal lending subsidiaries, and they're seeking the return  
18 of all monies paid to all these LDF Holding subsidiaries.

19 This leads us to the first basis for dismissal, Your  
20 Honor. Plaintiffs have fundamentally failed to state a claim  
21 for relief. Again, plaintiffs' claims are that these  
22 individual defendants conspired to violate state lending and  
23 usury laws.

24 Now, in order to state a plausible RICO claim, as  
25 the Court knows, you must allege a conduct, number two, of

Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/2022 6

1 enterprise through a pattern of racketeering, in this case  
2 it's the collection of unlawful debt, and there must be an  
3 injury to plaintiff by reason of the RICO enterprise.

4 The first issue, or the first problem with the way  
5 the RICO causes of action were pled is that plaintiffs have  
6 not sufficiently pled the existence of an actual enterprise.

7 Now, an enterprise, of course, is an association or  
8 group of people associated together for a common purpose;  
9 however, under the Intracorporate Conspiracy Doctrine a  
10 corporation acting in concert in an ordinary course of  
11 business with its agents and employees is not a RICO  
12 enterprise, and that's what we have here, Your Honor.

13 Plaintiffs are alleging that these individual  
14 defendants worked with either the companies they were  
15 employed by, in Ms. Lorenzo's case, or which they sat on the  
16 board of, which is Ms. Reynolds' case, or the tribe, and that  
17 they conspired together into one enterprise conspiracy.

18 The second problem with this RICO cause of action is  
19 plaintiffs have not alleged an actual pattern of  
20 racketeering. Again, here the racketeering activity is the  
21 collection of the unlawful loans.

22 Noticeably absent from plaintiffs' complaint is any  
23 actual allegations about the loans these plaintiffs took out.  
24 It does not state the actual tribal lending company which the  
25 loan was provided by.

Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/2022 7

1           It does not provide the date the loans were  
2 provided, how much principal was given, how much was paid  
3 back, and what interest was paid back. None of those  
4 allegations are in the complaint, so there hasn't been a  
5 pattern of racketeering that has been sufficiently pled.

6           Just as an example of the conclusory nature of the  
7 allegation pled --

8           THE COURT: Let me ask you, do you need the pattern  
9 when you're alleging the loan?

10          MR. MCANDREWS: So, Your Honor, for the pattern you  
11 actually need to allege what these individual defendants or  
12 how these individual defendants collected on the loan, and  
13 since there is no allegations of how they collected on it,  
14 right, they haven't alleged that they paid back principal or  
15 interest or really anything on the loan, so you do need to  
16 allege what these individual defendants did to collect on the  
17 quote/unquote "unlawful loan" to prove the pattern. But,  
18 again, there is no allegation specifically about this loan.

19          THE COURT: What do you mean what they did to  
20 collect it when just if it was an illegal loan, no matter how  
21 they collected, it would still be an illegal loan, wouldn't  
22 it?

23          MR. MCANDREWS: Well, but they haven't even  
24 explained how these individual defendants actually issued the  
25 loans.

Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/2022 8

1           If you remember, Your Honor, the tribal lending  
2 subsidiary -- I believe in Mr. Williams' case Niizhwaaswi LLC  
3 was actually the lender of that, so they have not alleged how  
4 these individual defendants got Niizhwaaswi to collect on the  
5 loan and issue illegal loans, and that's the problem.

6           There is not this connection, because you've got to  
7 remember none of the actual tribal entities have been named  
8 in this lawsuit. These are only individuals who had  
9 shoestring ties to these organizations.

10          Now, again -- sorry, Your Honor.

11          THE COURT: Go ahead.

12          MR. MCANDREWS: So just as an example of some of the  
13 conclusory allegations in this complaint, I point the Court  
14 to paragraph 58, and that is for -- this is directed at  
15 defendant Joseph Wildcat, and it's almost verbatim for all  
16 the defendants. It's kind of restated.

17          I quote, "Upon information and belief, defendant  
18 Joseph Wildcat, Sr. was instrumental in furthering the  
19 illegal lending business and agreed to the collection of  
20 unlawful debt."

21          But, again, they don't explain it. There are no  
22 further allegations regarding those, specifically what  
23 Mr. Wildcat did or what Ms. Lorenzo did or what Ms. Reynolds  
24 did, and that's the fundamental flaw with --

25          THE COURT: Well, he knows that he's accused of



Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/2022 9

1 collecting an unlawful debt. I mean, that puts him on  
2 sufficient notice of what he's got to defend, doesn't it? He  
3 knows these people, Reynolds and whatever their name is, they  
4 borrowed the money.

5 MR. MCANDREWS: Well, Your Honor, for Joseph  
6 Wildcat, he was the president of the tribal council, so he  
7 wasn't even involved in the day-to-day operations of this.  
8 You know, he was on -- he oversaw LDF Business Development  
9 Corporation which had a bunch of different businesses, and  
10 one of them was the lending subsidiary.

11 So, again, the allegations lack any tying up to  
12 these individual defendants because what the plaintiffs do is  
13 they essentially make allegations against the tribe and the  
14 tribal lending company and just say, oh, all these individual  
15 defendants were somehow involved, but they don't actually  
16 explain it, and that's the problem. They aren't really  
17 alleging a tie.

18 THE COURT: The purpose of the pleading is to let  
19 them know what they're accused of so they can defend it. And  
20 it looks to me that it's pretty -- either he would know  
21 whether he's involved in any loans to these people or not.

22 MR. MCANDREWS: They haven't actually alleged that  
23 he was personally involved in the loans. They've said that  
24 the tribal lending company was and that's what tied it to  
25 him, but because we're dealing with RICO cause of actions,

Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/202210

1 there is a heightened pleading standard more than just your  
2 normal causes of action.

3 I think what would be really instructive for the  
4 Court is to point the Court to the *Manago v. Cane Bay*  
5 *Partners* case. That was a case that was just decided two  
6 weeks ago, and it was in the District Court of Maryland.

7 In that case it's almost identical to this case,  
8 Your Honor. It's the same structure where you allege the  
9 tribal lending entities and these individuals conspired to  
10 violate state lending laws.

11 In that case -- Your Honor, the complaint in *Manago*  
12 and the complaint here is almost identical. I mean, word for  
13 word. We can get into it, but most of the alleged factual  
14 allegations are pretty much word for word identical.

15 In that case, the Court dismissed on a Motion to  
16 Dismiss the entire complaint, including the RICO cause of  
17 actions, finding that, one, the plaintiffs' group pleading  
18 incorrectly lumps defendants together without specifying  
19 allegations attributable to each individual defendant.

20 Two, that the allegations establishing the agreement  
21 to participate in the enterprise were conclusory rather than  
22 factual. And, three, that the complaint was devoid of any  
23 actual facts about the structure and organization of the  
24 alleged RICO enterprise.

25 The same is true here. There have been no facts

Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/202211

1 that have been alleged that specifically explain the  
2 structure and organization or how each individual defendant  
3 actually participated in the enterprise or agreed to  
4 participate in the enterprise.

5 Now, the third problem with the lawsuit, Your Honor,  
6 is that plaintiffs have not alleged that they were in fact  
7 injured because they have not explained that they took out a  
8 loan, how much they took out a loan for, or that they've paid  
9 back either principal or interest on that loan. They  
10 actually haven't even alleged that there was an injury, that  
11 the conspiracy to issue and collect illegal loans has injured  
12 them, because they haven't alleged what was collected on any  
13 of these loans.

14 THE COURT: I understand that some of these things,  
15 you know, may be deficiencies, but what have you gained if  
16 these are readily cured by filing an amended complaint?

17 MR. MCANDREWS: Your Honor, it would greatly assist  
18 us in discovery and actually finding out what exactly they're  
19 alleging each -- you know, the actual enterprise and what was  
20 agreed to because right now --

21 THE COURT: But if they file an amended complaint, I  
22 mean, what I'm asking is, why couldn't they ask to file an  
23 amended complaint and correct most of these things, these  
24 issues? I don't --

25 MR. MCANDREWS: They could have. In fact, in the

Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/202212

1 *Manago* case I cited earlier, the Court gave the plaintiffs an  
2 opportunity to amend, but the Court in *Manago* said that,  
3 Look, because there is such a shoestring to these individual  
4 defendants, even how it was repled was still deficient.

5 But, again, in the *Manago* case the plaintiffs did  
6 amend, and the complaint was still dismissed for failure to  
7 state a RICO cause of action.

8 THE COURT: All right.

9 MR. MCANDREWS: As far as the declaratory judgement  
10 action, again, the plaintiffs are asking that the Court find  
11 that the loans should be void as they violate state law.  
12 But, again, just like the RICO claim, they haven't alleged  
13 anything about their loans. They haven't explained the  
14 loans, who they took out the loans from, the amount. So you  
15 can't support also the dec action as well.

16 Now, the second basis for dismissal, and this kind  
17 of goes back to what we were talking about earlier at the  
18 beginning, is that plaintiffs failed to join necessary and  
19 indispensable parties in this case.

20 When you read this complaint, you can tell it is  
21 pointed at the tribe, LDF Holdings, and its lending  
22 subsidiaries that issued the plaintiffs' loans, right?  
23 That's really the parties that are directed in this lawsuit.

24 So the fact that they haven't been named, nor can  
25 they be named because of sovereign immunity, makes this

Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/202213

1 complaint deficient from the get-go.

2 The individual defendants cannot get just  
3 adjudication without the tribe's or the TLE's involvement,  
4 and they can't be named because presumably, and maybe by  
5 admission of plaintiffs, they are shielded in a cloak of  
6 tribal sovereign immunity.

7 THE COURT: What about injunctive relief?

8 MR. MCANDREWS: I believe you're referring to the  
9 ex parte case. In that, Your Honor, they can seek injunctive  
10 relief if they actually named an individual that has the  
11 authority to stop the conduct.

12 Again, in *Ex Parte Young*, that was regarding whether  
13 or not a tribe could set up an off-reservation casino, and  
14 they named the individual in the tribe that actually was  
15 doing that, was actually setting up the non-gaming casino.

16 Here, again, they haven't alleged facts that any of  
17 these defendants have direct control. In fact, as I  
18 mentioned earlier, Ms. Reynolds and Ms. Lorenzo are no longer  
19 even at the tribe, and Mr. Wildcat is no longer president of  
20 the tribal council.

21 Now, the second kind of big component of our motion  
22 is the Motion to Compel arbitration, but, again, you don't  
23 even need to get there if you find that the complaint was  
24 insufficiently pled or that they're indispensable parties.

25 Nevertheless, the arbitration agreement is at issue,

Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/202214

1 and it's specifically at issue for one of the three  
2 plaintiffs, and that's Mr. Williams. He's the Georgia  
3 borrower.

4 Mr. Williams signed a loan agreement that contained  
5 an arbitration provision. He's the only one of the three  
6 plaintiffs that signed an arbitration agreement. So what  
7 we're asking is his individual claims be sent over to  
8 arbitration.

9 Now, in plaintiffs' response to our Motion to Compel  
10 Arbitration they fundamentally misunderstand and misstate the  
11 loan agreement and the arbitration provision, so I want to  
12 set the record straight on what's actually said in the  
13 agreements and how they work.

14 So the loan agreement has a governing law provision  
15 which states that the tribal law and applicable federal law  
16 apply to the loan. In a separate section called the Dispute  
17 Resolution Provision, there is an informal procedure for if a  
18 borrower wants to go to LDF before any formal proceedings and  
19 try to resolve the dispute.

20 If they don't feel that they got adequate resolution  
21 in that alternative dispute, informal alternative distribute  
22 procedure, what the agreement says is that doesn't create an  
23 independent cause of action, meaning that the borrower cannot  
24 say that LDF Holdings or its TLEs violated the loan agreement  
25 by not giving adequate informal resolution to their claims.

Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/202215

1 So that's a separate provision.

2 Separate from that is then a whole new provision  
3 called the arbitration provision. In the arbitration  
4 provision LDF Holdings and its tribal lending subsidiary  
5 state that they offer a limited waiver of their sovereign  
6 immunity to allow claims and disputes of borrowers, including  
7 Mr. Williams, to be brought through arbitration with AAA.

8 Now, the disputes that Mr. Williams or any borrowers  
9 can bring against LDF Holdings or the tribal lending  
10 subsidiary is all U.S. federal and state law claims,  
11 disputes, and controversies; all common law claims based on  
12 contract, tort, fraud, or other torts; and all claims based  
13 on violation of any state or federal Constitution statute or  
14 regulation.

15 So a borrower can bring those claims through  
16 arbitration. That is agreed to in the agreement, and that is  
17 part of the limited waiver.

18 Now, the arbitration agreement also applies to  
19 claims that a borrower has against the tribe officials and  
20 employees. So the claims against these individual defendants  
21 would be within the scope of the arbitration agreement.

22 Now, the arbitration agreement also provides that  
23 the arbitration shall take place in the plaintiff's county of  
24 residence and that LDF Holdings and its tribal lending  
25 subsidiaries will pay for all arbitration costs.

Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/202216

1           The arbitration provision notably provides that the  
2 arbitrator shall apply applicable substantive law consistent  
3 with the governing law set forth above, that's tribal law and  
4 federal law, and apply the Federal Arbitration Act and  
5 applicable statute of limitations and shall honor claims of  
6 privilege of recognized law.

7           Finally, the arbitration provision allows for any  
8 arbitration decision to be filed in any court having  
9 competent jurisdiction. So, presumably, if Mr. Williams or  
10 any borrowers get an award, they can actually move to enforce  
11 that award in any state or federal court.

12           Finally, the arbitration agreement does provide a  
13 delegation clause that provides that the scope, validity, and  
14 enforcement is delegated to the arbitrator.

15           Now, plaintiffs principally argue that the  
16 arbitration agreement is unconscionable, it violates public  
17 policy, and it perspectively waives federal law. That's  
18 clearly not the case here.

19           Borrowers are allowed to bring all their claims in  
20 arbitration. The arbitrator is free to apply applicable  
21 federal law, and if that applicable federal law points them  
22 to apply state law, the arbitrator has the ability to do  
23 that. It also allows that any arbitration award can be filed  
24 in state or federal court.

25           Now, plaintiffs cite to a host of tribal lending



Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/202217

1 cases where the court did not enforce arbitration provisions  
2 in the loan agreements and found that the arbitration  
3 agreements were procedurally and subsequently unconscionable.

4           However, none of those cases, not one of the cases  
5 cited by plaintiff is relevant to Mr. Williams' loan  
6 agreement and arbitration provision at issue here in this  
7 case. Those cases are completely different than the  
8 agreement Mr. Williams signed.

9           For example, in *Hayes v. Delbert*, a case cited by  
10 plaintiffs and is a Fourth Circuit case, in that case the  
11 loan agreement contained a governing law section in the loan  
12 agreement that stated that no United States state or federal  
13 law applies to this agreement.

14           In *Dillon v. BMO Harris*, also a case cited by  
15 plaintiffs and is a Fourth Circuit Case, in that case the  
16 loan agreement stated, and I quote, "No other state or  
17 federal law or regulation shall apply to this agreement."  
18 That's why the Court found it was unconscionable.

19           In *Gibbs v. Haynes* and in *Gibbs v. Sequoia Capital*,  
20 both cases cited by plaintiff, the choice of law provision in  
21 that loan agreement provided that the loan agreement shall be  
22 governed by tribal law and that the arbitrator shall only  
23 apply tribal law and that the arbitrator's decision must be  
24 consistent with tribal law. That's not what we have here in  
25 this case.

Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/202218

1           Another case cited by the plaintiff that's kind of  
2 interesting is the *Dunn v. Global Trust Management* case. Why  
3 this one is interesting is because the Court did find that  
4 this was unconscionable and against public policy, but there  
5 the arbitration provision again said only tribal law applies.

6           In the *Dunn* case the borrower -- the loan agreement,  
7 or the arbitration provision said that any arbitration award  
8 could not be filed in court, meaning that the borrower  
9 essentially would get an arbitration award that isn't  
10 enforceable, and that's why it was unconscionable and against  
11 public policy.

12           That's not what we have in our case. Again, any  
13 award Mr. Williams gets can be filed and enforced in state  
14 and federal court.

15           Now, in an attempt to try to manufacture this idea  
16 that the loan agreement perspective waives federal law,  
17 plaintiffs cite to or try to bring up LDF Holdings Consumer  
18 Financial Service Regulations Ordinance saying that it bars  
19 application of federal law, and that's just not the case.  
20 It's kind of a misunderstanding of the loan agreement.

21           So as we stated earlier, the loan agreement has a  
22 separate informal dispute resolution provision and then a  
23 separate arbitration provision. The ordinance applies to the  
24 dispute resolution provision.

25           It basically says that at that stage the tribe is

Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/202219

1 looking at whether or not to resolve it informally. They  
2 haven't waived any of their immunity.

3 Immunity isn't waived until the arbitration is  
4 actually brought and they've said yes, we've waived our  
5 sovereign immunity, and federal law does apply. So it's a  
6 little nuanced, but it's basically a red herring argument.

7 THE COURT: May I ask you a question?

8 MR. MCANDREWS: Yes.

9 THE COURT: If in the arbitration the arbitrator  
10 decides that an interest rate in excess of what Virginia's  
11 usury rate is should apply and that the plaintiffs owe the  
12 usury rate of interest plus principal, what would happen with  
13 such an award as that?

14 MR. MCANDREWS: Yeah, so that's kind of a good  
15 point, Your Honor. So how the arbitrator -- again, it kind  
16 of brings up a broader issue is we're talking in speculation  
17 here of what the arbitrator will and won't do, so a lot of  
18 the arguments advanced by plaintiff really are arguments that  
19 would be advanced if they tried to enter or move to, you  
20 know, an arbitration award, at that point saying, you know,  
21 if they tried to actually enforce the arbitration award,  
22 these arguments would be valid.

23 But to answer your question, what the arbitrator can  
24 do is they can look to federal law, and if the federal law  
25 points them to apply state law; for example, in the RICO

Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/202220

1 cause of action it does that. It states that an unlawful  
2 debt under RICO is a debt that's illegal under state or  
3 federal law.

4 So it allows the arbitrator to look at state law,  
5 and if he says, "Yeah, that is a violation of federal law,"  
6 then you have violated the RICO statute. The arbitrator can  
7 issue an award, and Mr. Williams can go and file that in any  
8 state or federal court to be enforced.

9 THE COURT: Okay. But my question is: Where the  
10 arbitrator decides that an interest rate above the legal rate  
11 is applicable, can -- I mean, what happens with that, that  
12 award that's not in favor of the plaintiff? Does he file  
13 that, or what does he do? How does he overturn that?

14 MR. MCANDREWS: So he would file that in any state  
15 or federal court having competent jurisdiction, and he would  
16 argue that the arbitrator misapplied the law in that there  
17 was an error at the arbitrator's level, and that's why the  
18 arbitration award should be invalidated.

19 Again, then all these arguments plaintiff advanced  
20 would be ripe, but at this stage we're kind of speculating on  
21 how the arbitrator is going to --

22 THE COURT: It's hypothetical. I'm sure at some  
23 point in history an arbitrator has gotten it wrong. I'm just  
24 curious. That's not -- I just wanted to know.

25 MR. MCANDREWS: I appreciate it. So a simple

Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/202221

1 reading of the arbitration provision, Your Honor, clearly  
2 shows that there is no prospective waiver of federal law.  
3 The arbitrator can apply federal law.

4 The arbitration agreement is fair, valid, and  
5 conscionable. The claims Mr. Williams brings are within the  
6 scope of the arbitration agreement, and his claim should be  
7 compelled to arbitration.

8 Now, the final argument we advance in our motion,  
9 and I won't spend too much time on this, is the Motion to  
10 Strike the class allegations.

11 Again, that goes back to the fact that plaintiffs  
12 have failed to state a cause of action and failed to add the  
13 necessary parties in this case because the class definition  
14 asks for LDF Holdings and tribal lending subsidiaries to  
15 return monies paid. And, again, they're not in this lawsuit.  
16 So plaintiffs have failed to allege an ascertainable class,  
17 and those claims should be stricken.

18 So in summary, Your Honor, the RICO claims haven't  
19 been properly pled, and the claims should be dismissed. And  
20 because we're dealing with RICO, they need to be more  
21 specific on the enterprise.

22 The indispensable parties have not been added to  
23 this lawsuit, nor can they, so this case cannot proceed.  
24 Even if you do find that it was adequately pled and the  
25 indispensable parties aren't needed, Mr. Williams' claim

Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/202222

1 should be compelled to arbitration and the class claims  
2 should be stricken.

3 Thank you, Your Honor.

4 THE COURT: Thank you. For the plaintiff.

5 MR. GUZZO: Good afternoon, Your Honor, Andrew Guzzo  
6 on behalf of the plaintiffs. Thank you for the opportunity  
7 to address the Court.

8 I want to start today with really two big picture  
9 points from our perspective. The first point is this motion  
10 really begins and ends with the Fourth Circuit's decision in  
11 *Hengle*.

12 Defendants move to stay this case pending the Fourth  
13 Circuit's decision in *Hengle*. In doing so, they argued that  
14 this case had overlapping core issues between the two cases.  
15 The Court granted this motion finding that it did.

16 The Fourth Circuit's decision was a major loss for  
17 the industry in general and for these defendants  
18 specifically.

19 In affirming Judge Novak's opinion, the Fourth  
20 Circuit expressly held that substantive state law applies to  
21 off-reservation conduct, and although the tribe itself could  
22 not be sued for its commercial activities, its members and  
23 officers can be.

24 That's the direct holding from *Hengle*, and that's  
25 exactly what we've done here. We've sued its members and its

Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/202223

1 officers. The tribe cannot shroud those people with immunity  
2 under *Hengle*.

3 It also held that enforcement of the tribal choice  
4 of law provision would violate Virginia's compelling public  
5 policy against usurious lending.

6 Following that ruling, *Hengle* has now settled. The  
7 tribal officials in that case agreed to cancel over  
8 \$450 million of debt, and their business partners are paying  
9 \$39 million in cash back to consumers.

10 Judge Novak preliminarily approved that settlement  
11 in May of 2022, and it's scheduled for final approval in  
12 October of 2022. Our final approval brief is actually due  
13 today. It's our case.

14 This case parallels *Hengle*. It's on all fours with  
15 it. We didn't try to reinvent the wheel here. The  
16 allegations and the theories are exactly the same. The  
17 complaints are the same.

18 We survived robust motions to dismiss in *Hengle*.  
19 Judge Novak wrote an 108-page opinion in that case that  
20 touches on pretty much every issue raised in this motion.

21 We tailored our complaint, which was filed six  
22 months after Judge Novak's decision, to follow the blueprint  
23 in that case, which we were largely successful on in the  
24 district court and completely successful on in the Fourth  
25 Circuit.

Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/202224

1           Just as in *Hengle*, at a high level, we allege that  
2 the president of the tribe oversees and controls the lending  
3 business by virtue of his executive position as the  
4 president. This is the same allegation and the same theory  
5 as *Hengle*.

6           In turn, we alleged that the president has  
7 authorized the creation of the lending businesses and  
8 oversees and supervises them, although he has delegated the  
9 day-to-day management to the co-defendants Chapman-Reynolds  
10 and Lorenzo. These are the same allegations and theories as  
11 *Hengle*.

12           In sum, we allege that they are the upper level  
13 management of a purely unlawful business that makes illegal  
14 loans in Virginia, Georgia, and elsewhere throughout the  
15 country.

16           What I'm trying to say, in other words, is this  
17 isn't a case that involves a lawful business, such as a real  
18 estate brokerage firm, that happens to have a secret side  
19 scheme involving a few rogue employees. The people that are  
20 overseeing this are overseeing a business that makes unlawful  
21 loans and nothing else.

22           As a Northern District of California judge put it in  
23 another case involving my firm, Judge Orrick in the *Brice*  
24 matter, "Defendants were instrumental in setting up and  
25 knowingly setting up an enterprise whose sole purpose was to



Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/202225

1 collect illegal debts thereby causing the acts to occur and  
2 reaping the benefits therefrom."

3 That's our position in this case. These are the  
4 high level executives. This is what they do, and without  
5 them, it wouldn't be possible.

6 Before I wrap up this point about *Hengle*, I want to  
7 note that it's not novel. There are multiple opinions from  
8 Judge Locke in the *Gibbs* case supporting our position. That  
9 case involved the same allegations and same theories.

10 There were three settlements in that case totalling  
11 more than \$780 million of debt cancellation and over \$150  
12 million of repayments to consumers.

13 Judge Locke wrote 11 different opinions in that case  
14 including multiple motions to dismiss from various different  
15 players involved in that enterprise who did a lot less than  
16 those involved in this case.

17 There are also multiple opinions from Judge Payne in  
18 the *Williams* and *Galloway* litigation. That litigation  
19 involves the same allegations and theories, except in that  
20 case we sued the actual tribal entity in *Williams*.

21 Judge Payne found that the entity did not have  
22 immunity, but the Fourth Circuit reversed. That is why  
23 *Hengle* was filed the way it was is because it came after  
24 *Williams* in the Fourth Circuit's decision in that case.

25 Rather than suing the four entities involved in

Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/202226

1 *Hengle*, we sued the officials, and the Fourth Circuit post  
2 Williams said that was completely okay and that they could be  
3 sued.

4 There is also a decision from Judge Morgan in  
5 *Solomon* on these issues. That case settled for \$86 million  
6 in cash and \$100 million in debt cancellation.

7 Beyond Virginia there are decisions in  
8 Massachusetts, Oregon, Vermont, and the Commonwealth of  
9 Pennsylvania all supporting our position. So, of course all  
10 of these other district court decisions are persuasive  
11 authority; however, the overwhelming authority is on our side  
12 in support of our position.

13 The second high level point I want to make, Your  
14 Honor, is now that *Hengle* is controlling on most of these  
15 issues, the biggest divide between the parties really boils  
16 down to the pleading standard.

17 They say the Court cannot accept our allegations  
18 because they are based on information and belief; thus, in  
19 their brief at page 35 they ask the Court to disregard  
20 allegations 3, 41, 43, 44, 49 through 50, 53 through 60, 62  
21 through 65, 67, 69, 70, and multiple other allegations. This  
22 is where we outline that these defendants oversee and have  
23 control and are involved in this business.

24 As Your Honor has explained in another case,  
25 pleading upon information and belief is appropriate when

Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/202227

1 factual basis supporting a pleading is only available to the  
2 defendant at the time of the pleading.

3 This is from Your Honor's opinion in *McClain v.*  
4 *Carucci*, 2011 Westlaw 1706810 at 4.

5 Here it is completely acceptable to use upon  
6 information and belief because plaintiffs don't have access  
7 to this information.

8 Indeed these companies intentionally try to hide the  
9 information related to their operation. There is nothing on  
10 the tribe's website, even though they advertise and provide  
11 information related to other businesses.

12 And this is intentional, Your Honor. Multiple  
13 people have been convicted of felonies for their involvement  
14 in these schemes. Scott Tucker, who was one of the pioneers  
15 of the tribal lending model, was convicted and sentenced to  
16 16 years in prison in 2018. His conviction was upheld by the  
17 Second Circuit.

18 Charles Hallinan, another pioneer of this lending  
19 scheme, was convicted and sentenced to 14 years in prison in  
20 the Eastern District of Pennsylvania. His sentence and  
21 conviction was upheld by the Third Circuit.

22 They intentionally try to conceal as much  
23 information as possible because of government enforcement  
24 actions, class actions, and criminal proceedings. Because of  
25 this, we think that upon the information and belief

Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/202228

1 allegations can be properly considered by the Court.

2 Now turning to more specifically the defendants'  
3 arguments, I'm going to begin on the *Manago* decision, which  
4 is really an outlier, but since it was highlighted  
5 significantly by the defendants, I'll start there.

6 In that case, the Maryland court agreed to dismiss  
7 the RICO claims as to tribal officials because it only sought  
8 injunctive relief. Here our RICO claims do not seek  
9 injunctive relief. We have a declaratory judgement claim  
10 solely against the president of the tribe, but we seek  
11 monetary relief against the individuals involved.

12 This is permissible under the Supreme Court's  
13 decision in *Lewis v. Clark*. Our brief thoroughly addresses  
14 this point that we can go after the individuals for their  
15 involvement for monetary relief.

16 As to the non-tribal defendants in the *Manago*  
17 decision, the Court found that the plaintiffs failed to  
18 adequately allege an enterprise. That's it. That was the  
19 sole basis that the Court dismissed the RICO claim.

20 There are three problems with the defendants'  
21 reliance on this point. First, the defendants never moved to  
22 dismiss on this ground. Instead they complained that it  
23 failed on several other grounds; namely, that we did not  
24 plead a distinct enterprise because all their actions were  
25 taken within their roles as individuals and employees of the

Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/202229

1 various entities, but they never moved to dismiss in their  
2 original pleading citing the same argument was cited in  
3 *Manago*.

4 I think the Court should hold them to their  
5 pleadings raised in their Motion to Dismiss, and it's unfair  
6 to let them now piggyback off a decision years later from  
7 when the briefing was completed.

8 Second, the Maryland court found that the plaintiffs  
9 in that case failed to allege what roles and responsibilities  
10 the defendants had in maintaining the enterprise. Here we  
11 have done this.

12 As I said before, we alleged the president  
13 supervises and oversees the tribe's lending business, and we  
14 further alleged that Reynolds and Lorenzo handled the  
15 day-to-day operations.

16 Rule 8 does not require us to detail every action  
17 taken by them, and there is no heightened pleading standard  
18 under a RICO case for unlawful debt collection.

19 Multiple courts have decided this. It's a Rule 8  
20 pleading. There is no heightened pleading standard. This  
21 isn't a fraud case, and we don't have to comply with Rule 9  
22 here.

23 The third point I would make regarding the *Manago*  
24 decision is that it wrongly applied binding precedent from  
25 the Supreme Court. In particular, the Maryland decision

Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/202230

1 found that the plaintiffs failed to show, and I'm quoting,  
2 "the specific nature of the structure of the enterprise and  
3 what roles and responsibilities each defendant had." Again,  
4 the specific nature of the structure and what roles and  
5 responsibilities.

6 But in *Boyle* the Supreme Court expressly noted that  
7 there was no requirement that an enterprise have a hierarchal  
8 structure or a chain of command and that decisions may be  
9 made on an ad hoc basis and by any number of methods.

10 The Supreme Court further added in that case that  
11 members of the group need not have fixed roles. Different  
12 members may perform different roles and at different times,  
13 and the group need not have a regular name, regular meetings,  
14 dues, established rules and regulations.

15 So when the Maryland court found that the specific  
16 nature of the structure and what roles and responsibilities  
17 were lacking, I would submit that that is contrary directly  
18 to the Supreme Court's decision in *Boyle* that there needs to  
19 be no hierarchal structure or chain of command. There only  
20 needs to be alleged relationships between the parties, and  
21 here we allege the relationships.

22 They're the president of the entities or the  
23 executives. Essentially, you know, it's a government entity,  
24 but one is considered the owner and others are the chief  
25 executive officer making all the decisions.

Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/202231

1           So for those reasons, we don't think *Manago* is  
2 persuasive, and we certainly think the overwhelming majority  
3 of the decisions in the other cases are certainly more  
4 persuasive.

5           With respect to the Motion to Dismiss -- now getting  
6 to the four overarching grounds for dismissal raised by the  
7 defendants. I'm going to start with the 12(b)(6) Motion to  
8 Dismiss.

9           Counsel stated in his argument that we have no  
10 allegations that our clients made any payments. That is just  
11 contrary to the allegations in the complaint. At paragraph  
12 89 of the complaint we allege that Mr. Aaron Fitzgerald --  
13 that the defendants received no less than \$4,860.87 from  
14 Mr. Fitzgerald. That's at paragraph 89.

15           At paragraph 94 we allege that the defendants,  
16 together with the others in the lending enterprise, received  
17 no less than \$104.88 from Ms. Fitzgerald. And at paragraph  
18 99 we allege that defendants, together with other members of  
19 the enterprise, received no less than \$10,892.

20           All of this money is illegal debt under RICO which  
21 defines unlawful debt as debt that's unenforceable under  
22 state or federal law as to principal or interest due to laws  
23 relating to usury.

24           Now, Virginia and Georgia, as we have explained in  
25 our papers, make both the principal and the interest illegal

Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/202232

1 and unenforceable, and, therefore, all payments made by our  
2 plaintiffs are sufficient to allege an injury.

3 On top of that, the defendants' argument is belied  
4 by the structure of the loan agreements themselves. These  
5 agreements work like a loan, as we've pointed out in our  
6 papers, like a mortgage.

7 Every payment that is made by a consumer goes in  
8 part to principal and in large part to interest. So by  
9 alleging that they made payments on these loans, including  
10 \$10,000 of payments, it can be reasonably inferred that the  
11 plaintiffs repaid both usurious principal and interest, and  
12 we allege that they also still owe outstanding money on the  
13 loans.

14 One other point to make in response to counsel's  
15 argument. This isn't a racketeering case. The statute  
16 creates two predicate acts. One is the pattern of  
17 racketeering, and the other one is the collection of unlawful  
18 debt which contains no pattern requirement.

19 It's not a racketeering case which has a very  
20 specific definition under the statute as opposed to  
21 collection of unlawful debt which requires, as court after  
22 court has explained, no direct collection effort by the  
23 defendant but participation in the operation or management of  
24 the affairs of the enterprise.

25 A few other points to make with respect to the



Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/202233

1 12(b)(6). They've argued that it's a shotgun pleading  
2 because we failed to articulate what each one of them did.  
3 We've explained that they are the high level executives, and  
4 RICO is a group theory of liability.

5 The pleading isn't a group pleading or a shotgun  
6 pleading. We explain how they've conducted the affairs of  
7 the enterprise, and there is a sufficient nexus between the  
8 defendants and the enterprise that they can be held  
9 responsible for the ACH collection of the entity.

10 As the Dugan Court explained in addressing this same  
11 argument, the Massachusetts court said, "A sufficient nexus  
12 or relationships exists between the predicate act and the  
13 enterprise if the defendant was able to commit the predicate  
14 act by means or by consequence by reason of agency of his  
15 association with the enterprise."

16 RICO doesn't prohibit collection of the unlawful  
17 debt. It's not a statute like the Fair Debt Collection  
18 Practices Act that holds a single debt collector  
19 responsible. It's a statute that holds groups responsible  
20 and recognition that groups are more dangerous than  
21 individuals, and anyone who is involved in this enterprise  
22 that's collecting the debt can be as long as they are  
23 managing the affairs or participating in the enterprise.

24 With respect to defendants' arguments that we failed  
25 to allege when, who, how much the interest was that was paid,

Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/202234

1 and who it was paid to, we allege Mr. Fitzgerald received  
2 five loans from the subsidiaries, that Ms. Fitzgerald  
3 received one, and that Mr. Williams received at least five.  
4 That's in paragraph 86, paragraph 90, and paragraph 95.

5 We allege that the interest rates in these were all  
6 triple digits, which is 20 to 50 times Virginia and Georgia  
7 law, and that's the critical component that makes these debts  
8 unlawful debts under RICO.

9 We don't need to allege when or -- there's no  
10 pleading requirement as to that. And the defendants attached  
11 the loan contracts in this case, at least with respect to  
12 Mr. Williams, to their pleadings. It was within the four  
13 years that would be within the statute of limitations for  
14 RICO.

15 So I don't think it really should be necessary for  
16 us to go back and have to say he took out this loan in 2017  
17 or whenever it was. I mean, they know the information. It  
18 just seems like kind of a waste of time to have us go back  
19 and do that.

20 With respect to their argument that the president of  
21 the tribe has now switched since the complaint was filed,  
22 it's just appropriate to substitute him in. This isn't the  
23 first case where there has been an official capacity suit  
24 against the president or head of an agency, and courts,  
25 including the Second Circuit in the *Gingras* matter, said that

Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/202235

1 the defendant can't just moot the case by switching the  
2 individual involved. It runs with the position.

3 So if we need to just substitute whoever the new  
4 president is, that's an easy way to do it. We did it in  
5 *Hengle*. On multiple occasions throughout that case different  
6 members of their tribal council had turned over, so we  
7 substituted three of them at various times in the litigation.  
8 That's the appropriate course of action for that argument.

9 With respect to -- one of the central arguments in  
10 their brief on the Motion to Dismiss is that we have failed  
11 to allege a distinct enterprise as opposed to the individuals  
12 running it.

13 That argument is directly contrary to the Supreme  
14 Court's decision in *Cedric Kushner*. We've briefed that at  
15 length, and I just wanted to highlight that for the Court.

16 With respect to the declaratory judgement count, the  
17 Declaratory Judgement Act allows a federal court in a case or  
18 actual controversy to declare the right and legal relations  
19 of any interested party seeking a declaration whether or not  
20 it is entitled to further relief that could be sought.

21 This Court has said the test for that is whether the  
22 complaint alleges an actual controversy. The Court possesses  
23 an independent basis for jurisdiction, and the Court does not  
24 abuse its discretion. That's the test.

25 Unquestionably we meet all of these requirements.

Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/202236

1 There is an actual controversy as evidenced by the papers.  
2 We think the loan is void. They think it's perfectly  
3 legitimate and enforceable, and they continue to accrue  
4 interest on the loan. Determining parties' rights with  
5 respect to a contract is the classic example of -- one of the  
6 classic examples of when the party can use the Declaratory  
7 Judgement Act.

8 The Court possesses an independent basis for  
9 jurisdiction under RICO, and if necessary, we could plead  
10 that the Court would have an independent basis under the  
11 Class Action Fairness Act because the plaintiffs and the  
12 defendants are from different states, and the amount in  
13 controversy is over \$5 million.

14 That, admittedly, is not in our complaint, Your  
15 Honor, but if we needed to go back and do that for an  
16 independent basis for jurisdiction, we certainly could.

17 In addition, we could allege in an amended complaint  
18 that the loans violated Virginia usury laws and Georgia laws  
19 which entitles the plaintiffs to injunctive and declaratory  
20 relief as was found by Judge Novak in *Hengle*. Judge Novak  
21 also allowed us to proceed on count 6 in *Hengle* on a pure  
22 declaratory judgement claim.

23 With respect to their argument that -- really  
24 briefly, Your Honor, as to the necessary parties argument,  
25 this is foreclosed by *Hengle*. The Court there said

Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/202237

1 substantive state law applies to off-reservation conduct, and  
2 the tribe's members can be sued.

3 Judge Novak dealt with this argument at length in  
4 the district court opinion, and necessary parties aren't  
5 subject to an appeal as a matter of right. So that was  
6 not -- it did not go up to the Fourth Circuit on the  
7 interlocutory appeal.

8 I think one of the implicit results of the Fourth  
9 Circuit's decision is that members and officers can be sued  
10 in federal court for violations of state and federal law, and  
11 that's also implicit from the Supreme Court's decision in *Bay*  
12 *Mills*, which was heavily relied on by the Fourth Circuit in  
13 reaching its decision in *Hengle*.

14 Now turning to the arbitration issue, Your Honor. I  
15 want to begin by answering from my perspective your question  
16 that you asked to counsel about what if the arbitrator wants  
17 to apply state law in the arbitration. The answer to that is  
18 the arbitrator, he or she, can't.

19 Arbitration is a matter of contract. They're not  
20 judges. They don't get to, like judges, look to the rules  
21 and apply and use the authority that is given to them under  
22 the Constitution and the federal rules. They are bound by  
23 what the contract allows them to do.

24 So here the contract would not allow an arbitrator  
25 to apply state laws or to consider an argument that

Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/202238

1 Virginia's public policy against usurious lending renders the  
2 contract unenforceable and violates the Prospective Waiver  
3 Doctrine.

4 A few more points on the arbitration clause, Your  
5 Honor. There has been five case from the Fourth Circuit on  
6 this issue, *Hayes, Dillon, Gibbs, Gibbs, and Hengle*. Four  
7 out of the five of those my firm was heavily involved in.  
8 Four out of the five of them dealt with different contracts,  
9 but the Fourth Circuit found them materially  
10 indistinguishable.

11 There is a myriad of different ways that someone can  
12 violate the Prospective Waiver Doctrine. Here they really  
13 did in three independent ways that we think suffice, any one  
14 of which to render it unenforceable.

15 First, there is an express waiver in the contract.  
16 The dispute procedure itself says it's considered to be a  
17 petition for redress submitted to a sovereign government, and  
18 it does not create any binding procedural or substantive  
19 rights. If a consumer is unhappy with the tribe's  
20 adjudication of that dispute, it's only subject to  
21 arbitration of that dispute.

22 We repeatedly cite this as the problem in our  
23 briefing. In response, in their rebuttal brief defendants  
24 said nothing. The argument they have today is new, and I'm  
25 going to address that in just a second.

Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/202239

1 But after the briefing concluded in this case, Judge  
2 Payne in *Williams* said that this provision, even though there  
3 was a choice of law clause that said applicable federal law  
4 was one of the reasons why that contract was a prospective  
5 waiver of borrower's rights.

6 That case is now going up to the Fourth Circuit for  
7 arguments in October. So we're going to have some more  
8 insight as to what the Fourth Circuit thinks about that  
9 provision.

10 But what counsel said today is that the provision is  
11 saved because it references that the disputes subject to  
12 arbitration are tribal, federal, and state law claims,  
13 therefore they must be arbitrable.

14 The Fourth Circuit expressly rejected this argument  
15 in *Hengle*. In doing so, they said that such language does  
16 not counteract the effect of the choice of law provisions.  
17 Indeed, each of the arbitration agreements in *Hayes*, *Dillon*,  
18 *Haynes* and *Sequoia* required federal claims to be sent to  
19 arbitration, but the Court in each case nonetheless found the  
20 agreements prevented the effective vindication of federal  
21 rights.

22 So the Court concluded, if anything, the inclusion  
23 of this language that has been cited by the defendants  
24 highlights that the arbitration provision is an impermissible  
25 tactic of compelling arbitration of federal claims only to

Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/202240

1 nullify those claims by precluding the application of federal  
2 law in the arbitration. So that provision absolutely does  
3 not save them.

4 The second basis for the prospective waiver in this  
5 case, Your Honor, is that the tribal code mirrors the  
6 problematic codes that the Fourth Circuit found in *Gibbs*.

7 These codes were drafted by the same law firm. The  
8 contracts were drafted by the same law firm who is involved  
9 with both of these tribes, and noticeably absent from their  
10 code is required compliance with RICO, which is the only  
11 federal statute that would govern the loans at issue, or  
12 certainly the central one.

13 The tribal code does not allow for claims against  
14 anyone other than the lending entity, and it doesn't create a  
15 private cause of action. For all of these reasons, the Court  
16 found in *Gibbs* that the tribal codes were further evidence of  
17 these contract's attempts to waive federal law.

18 And here the code is actually worse, and we've  
19 pointed this out in our briefing. The tribal code, the law  
20 that must be applied by the arbitrator, states that in any  
21 proceeding in which a licensee is a party in interest with  
22 respect to the transaction, the licensee's rights and  
23 remedies shall be granted upon prima facie proof of  
24 entitlement based on the terms of the written transaction and  
25 the payment and business records maintained by the licensee.



Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/202241

1 That's at docket 50-1, page 34. It's LDF code section  
2 8.4(i)(3).

3 This essentially mandates an automatic win for the  
4 licensee, including their employees who are also defined as  
5 part of the licensee.

6 These laws cannot simply be ignored by an  
7 arbitrator. They are bound to apply tribal law under the  
8 contract, and arbitration is solely a matter of contract.  
9 This is exactly why we have the Prospective Waiver Doctrine  
10 and why the Fourth Circuit has repeatedly struck down similar  
11 contracts.

12 In addition, the final basis we would say that the  
13 contract violates the Prospective Waiver Doctrine is that in  
14 *Hengle* the Fourth Circuit expanded the doctrine. It took  
15 issue with the fact that the contract repeatedly waived state  
16 law as a basis for finding a violation -- it took issue with  
17 the state law waivers finding that that was also part of the  
18 prospective waiver.

19 Again, as I said at the beginning of the part about  
20 the arbitration, this case highlights the importance of  
21 disclaiming a state law in arbitration. An arbitrator could  
22 not apply Virginia's or Georgia's public policy against  
23 usurious lending. They're just bound by the terms of the  
24 contract.

25 So for all those reasons, Your Honor, we think that

Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/202242

1 this falls squarely within the Fourth Circuit precedent as to  
2 those issues.

3 One final point, Your Honor, before I wrap it up.  
4 To the extend the Court finds any deficiencies in the  
5 complaint, we've asked for leave to amend. We haven't  
6 amended the complaint to date. It was filed over two years  
7 ago, July 24th, 2020.

8 We certainly, I think, can clean up any of the  
9 deficiencies that have been raised, including more  
10 allegations, for example, about the tribal council and  
11 substituting parties.

12 So with that, unless the Court has any questions for  
13 me, that wraps up what I have to say.

14 THE COURT: Okay. Thank you.

15 MR. GUZZO: Thank you.

16 THE COURT: Mr. McAndrews?

17 MR. MCANDREWS: Your Honor, you cut out there.

18 THE COURT: Yes, go ahead.

19 MR. MCANDREWS: I just have a couple of points.  
20 First, the whole diatribe about Scott Tucker and all these  
21 other cases and all these other lending enterprises that have  
22 nothing to do with LDF are also in the complaint, and they  
23 kind of highlight the nature of the complaint.

24 The plaintiffs want to talk about all these other  
25 cases or all these other tribal lending systems, but that's

Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/202243

1 not -- that has nothing to do with LDF. So, you know,  
2 striking that as just immaterial from the get-go, we asked  
3 for that in the motion and from this oral argument because  
4 that's all irrelevant.

5 What is also irrelevant is the settlements in these  
6 other cases. These are very different cases. They all deal  
7 with different business structures, different loan  
8 agreements, different arbitration agreements.

9 I congratulate the plaintiffs' counsel on the  
10 *Hengle* settlement as well. In *Hengle*, though, Your Honor, as  
11 I stated earlier, it's a fundamentally different agreement.  
12 It has a different choice of law provision that only allows  
13 application of tribal law.

14 Also in *Hengle*, what the Court principally said was  
15 that individual defendants -- the issue before that Court was  
16 whether these individual defendants are cloaked with  
17 sovereign immunity, and that was the issue that they said,  
18 no, they aren't cloaked with sovereign immunity like the  
19 tribe. If you noticed, we're not advancing that argument  
20 here in this oral argument.

21 So that's why the case was stayed, because if the  
22 Fourth Circuit would have said that individual defendants are  
23 cloaked with sovereign immunity, then obviously the  
24 plaintiffs couldn't move forward in this case. So that's the  
25 limited ruling that was the similarity or that was the

Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/202244

1 overlap in the *Hengle* cases.

2 But, again, in *Hengle* what it said about the  
3 arbitration agreement and whether or not it's unconscionable  
4 or violates public policy, that's not applicable here mainly  
5 because it's a different agreement.

6 Second, Mr. Williams is a Georgia resident. *Hengle*  
7 analyzed whether the arbitration agreement was in violation  
8 of Virginia public policy, not Georgia's public policy, so  
9 that's also a huge difference in those cases as well.

10 As for the discussion about the necessary parties  
11 and that the *Hengle* case actually made a decision about that,  
12 I want to clarify just what Mr. Guzzo said.

13 That issue was not before the Fourth Circuit.  
14 Whether or not the tribe needs to be a necessary party, that  
15 wasn't analyzed by the Fourth Circuit. Again, when it was  
16 discussed at the trial or the district court level, it was in  
17 regards to whether or not individual defendants were cloaked  
18 with sovereign immunity, and that's some nuances there and a  
19 lot different.

20 I heard a lot in the argument also that the  
21 plaintiffs have alleged that the defendants in this case, the  
22 individual defendants, have overseen lending operations and  
23 that they are high level executives, but they don't ever go  
24 forward and explain what they oversaw and how they oversaw.

25 Again, we're kind of two years in. I think as

Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/202245

1 Mr. Guzzo said, he's dealt with a lot of different tribal  
2 lending entities. He knows how to get the information before  
3 filing suit because we've seen it in other complaints. We  
4 cite to it in our reply brief. A lot of this is public  
5 information.

6 THE COURT: Question: If you are in fact, you know,  
7 charged an outrageous illegal amount of interest on these  
8 loans, what difference does it make about how they managed to  
9 do it?

10 I mean, why isn't it enough to say, look, here is  
11 the contract that says I have to pay 120 times what the legal  
12 rate is? It doesn't make any difference what the  
13 mechanization is or how the money gets back to the lender.

14 MR. MCANDREWS: Well, again, if the individual  
15 tribal lending entity that actually charged that illegal  
16 interest rate was named in this lawsuit, that would be a  
17 relevant issue, but they haven't been.

18 Again, you've got to remember the individual  
19 defendants in this lawsuit are being individually named in  
20 their individual capacity, so they haven't explained how  
21 these individual defendants took steps outside of their  
22 employment to conspire to charge illegal loans and to collect  
23 or to receive any benefit of those illegal loans.

24 Again, separating the fact that the tribal lending  
25 entities and the tribe hasn't been named, these individual

Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/202246

1 defendants, you know, have a shoestring connection here. So  
2 in all fairness, their individual assets are on the line, so  
3 that's why it's important that we find out exactly what the  
4 plaintiffs are alleging for those individual defendants.

5 THE COURT: Well, why in this case since -- how  
6 would anyone know necessarily how these people worked  
7 together to do this?

8 MR. MCANDREWS: Well, I suppose that they could do a  
9 pre-suit investigation, Your Honor. Also, I might point out  
10 that the loan agreements, which plaintiffs all have their  
11 loan agreements, and on page one at the very bottom it  
12 actually fully dives into the fact that the tribe, and  
13 they're a federally-registered tribe, they own the business  
14 development corp.

15 They explain the ownership structure in the loan  
16 agreement, which is in the hands of all the plaintiffs. They  
17 actually get e-mailed a copy. So purely on the face of the  
18 loan agreement they can figure this out and make these  
19 allegations.

20 THE COURT: Okay. Go ahead.

21 MR. MCANDREWS: As far as -- so the plaintiffs also  
22 mentioned that they had at paragraphs 89 and 94 made all the  
23 facts they need about the loans, but if you actually look at  
24 these allegations, it just says that they received no less --  
25 that the defendants received no less, and then they state a

Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/202247

1 certain amount.

2 But, again, they don't state how these defendants  
3 received that amount, and they don't explain anything about  
4 the loans. I don't even know if that amount is the amount of  
5 the loans because that's not how they pled that.

6 They basically said that the defendants somehow  
7 collected from Mr. Fitzgerald, or just actually got a benefit  
8 of \$4,000 in connection with Mr. Fitzgerald. So, again,  
9 alleging the loans is key to making most of their causes of  
10 action in the complaint.

11 I will say briefly on the Intracorporate Conspiracy  
12 Doctrine plaintiffs cited to, and we do brief the issue of  
13 the Supreme Court's case in *Cedric Kushner*, first of all,  
14 that was a different type of RICO cause of action than we  
15 have here in this case.

16 After the *Cedric Kushner* case, the Supreme Court  
17 case, the Fourth Circuit in *Walter v. McMann* actually  
18 analyzed the *Cedric Kushner* case and found that plaintiffs  
19 still need to allege that a person in a separate corporation  
20 in order to allege an enterprise. So I direct the Court to  
21 the *Walter v. McMann* case regarding their argument on the  
22 *Cedric Kushner* case.

23 Finally, Your Honor, again, all the cases cited by  
24 plaintiffs that I went through in my opening, and Mr. Guzzo  
25 actually restated them, they all have different loan

Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/202248

1 agreements. They all have different arbitration clauses.  
2 All those cases he cited required application of tribal law.  
3 Ours allows application of a federal law; therefore, it's not  
4 unconscionable, and it's not in violation of --

5 THE COURT: You say that allows application of  
6 federal law. What application of federal law?

7 MR. MCANDREWS: So this goes back to, Your Honor,  
8 sovereign immunity. The tribe under the Indian  
9 Reorganization Act was basically given it's authority to act  
10 as a state -- it acts as a similar state government equal to  
11 those of the states, meaning that other state laws cannot  
12 regulate or apply to the conduct of the tribes or the tribe's  
13 corporations.

14 THE COURT: What I'm getting to is your position  
15 that they have a right to charge rates above the legal limit  
16 of these states.

17 MR. MCANDREWS: Yes, Your Honor. It's not because  
18 of immunity. It's because all of these loans are approved,  
19 given, and operated through, and entered into on the tribal  
20 reservation where they are legal. So really the issue is  
21 whether it's on- or off-reservation conduct, which again is  
22 something that the arbitrator can decide.

23 If the arbitrator hears the facts and says, you know  
24 what, this is off-reservation conduct, I suppose that's  
25 something the arbitrator could do, but that's really the



Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/202249

1 issue.

2 So to say that our loans are subject to Virginia  
3 law, we would assert as a defense that, no, because the loans  
4 were consummated on the tribe's reservation, again, which  
5 acts as a sovereign state.

6 THE COURT: How do these other cases come out saying  
7 that there is no sovereign immunity that would allow you to  
8 charge the unlawful rates?

9 MR. MCANDREWS: Your Honor, there are actually no  
10 cases that have found that. What they've said is that the  
11 individual defendants are not cloaked with the same sovereign  
12 immunity as the tribe and the tribal lending corporations.  
13 That's what the distinction is.

14 So we're talking about tribal sovereign immunity,  
15 and kind of what I think you're talking about or more what  
16 the issue is is where do -- what laws apply to the loan when  
17 the loan is being consummated and given on the tribe's  
18 reservation.

19 THE COURT: Okay. Why is it that your tribe can  
20 charge the unlawful rate and these others cannot? Is it just  
21 because of the way you drew the contract?

22 MR. MCANDREWS: So, Your Honor, to say these others  
23 cannot, there has been really -- all those cases that  
24 Mr. Guzzo cited to, they've settled. So they've agreed to  
25 out-of-court settlements, and I believe all of the

Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/202250

1 settlements, including the one in *Hengle*, which is publicly  
2 filed, there is no admission of liability.

3 So I don't know that there has actually been a  
4 finding on that. That actually is an issue, Your Honor,  
5 that's probably ripe for the Supreme Court. There is a  
6 circuit split. You have the Sixth Circuit -- it's a circuit  
7 split on the issue of whether or not giving loans is off- or  
8 on-reservation conduct.

9 Of course, the Sixth Circuit has said, no, loans are  
10 -- those are actually on-reservation conduct because the  
11 loans are being consummated and given on the tribe, and other  
12 circuits have differed on that, but the issue has not  
13 actually been presented at the Supreme Court.

14 THE COURT: Okay. So why wouldn't that be the first  
15 question? If you can't charge -- if the tribe cannot charge  
16 the unlawful rate, why go further?

17 Why go to all these other things? Why wouldn't the  
18 Fourth Circuit just say the tribe can do it?

19 MR. MCANDREWS: I mean, as far as in *Hengle*, I don't  
20 know that they -- I don't specifically know if that issue was  
21 presented. I can't recall. But if it was, there is still a  
22 split in the circuit.

23 Again, my clients are up in Wisconsin. Even if the  
24 Fourth Circuit said, yeah, those are -- you know, you can't  
25 charge illegal loans, that's off-reservation conduct, again,

Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/202251

1 there is a split in the circuit and what laws apply. I think  
2 this all goes back to kind of --

3 THE COURT: Wouldn't I have to apply Fourth Circuit  
4 law?

5 MR. MCANDREWS: I'm sorry, what?

6 THE COURT: Wouldn't I have to apply Fourth Circuit  
7 law?

8 MR. MCANDREWS: To our loan agreement? The  
9 arbitrator could, if that's what you're asking.

10 THE COURT: No, I'm asking about me. In deciding  
11 this case, shouldn't I be applying Fourth Circuit law?

12 MR. MCANDREWS: Yes, in regards to whether or not a  
13 claim has been properly brought and indispensable parties.  
14 But, again, the arbitration agreement, Your Honor,  
15 Mr. Williams is down in Georgia. We assert, I think in our  
16 reply brief on page 6, that actually Georgia law and its  
17 circuits apply.

18 THE COURT: Okay. Go ahead.

19 MR. MCANDREWS: I think, Your Honor, that is it for  
20 my rebuttal.

21 THE COURT: All right. Thank you. That's been very  
22 helpful. We'll adjourn the hearing.

23 MR. GUZZO: Your Honor, I know Mr. McAndrews is  
24 entitled to the last word here, but if I could just say one  
25 thing for 30 seconds real quick here.

Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/202252

1 THE COURT: You may, and he may respond.

2 MR. GUZZO: Okay. So with respect to whether the  
3 conduct is on- or off-reservation, that was one of the  
4 central issues in *Hengle*, and here is what the Fourth Circuit  
5 said: "The tribal officials assert that the conduct at issue  
6 here occurred on the reservation unlike the off-reservation  
7 conduct in gaming in *Bay Mills*. But as the district court  
8 observed, the conduct at issue here is where the parties made  
9 and accepted the agreements."

10 "For example, the defendants allegedly marketed  
11 their lending business throughout the country, including in  
12 Virginia, to plaintiffs who resided on non-Indian lands where  
13 they applied for their loans."

14 "Defendants also collected loan payments from the  
15 plaintiffs while they resided in Virginia from bank accounts  
16 maintained there, and the effects of defendants' allegedly  
17 illegal activities were felt by the plaintiffs in Virginia."

18 "These activities are directly analogous to lending  
19 activities that courts have found clearly constitute  
20 off-reservation conduct subject to state law."

21 Indeed, the tribal officials have not brought to our  
22 attention any court reaching a contrary conclusion. I don't  
23 know what Sixth Circuit case Mr. McAndrews is talking about,  
24 but the Fourth Circuit was very clear on this point, and that  
25 is that Virginia law applies to this conduct because it is

Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/202253

1 off-reservation conduct done over the internet when the  
2 consumer is in Virginia.

3 To say that a consumer may go on the internet and do  
4 all things in their home state and that it's subject to the  
5 law of somewhere else, whether it could be Canada or  
6 Wisconsin or California, Virginia has a strong interest in  
7 policing the individuals within their border, and the Fourth  
8 Circuit definitively decided this issue. It's one of the  
9 central and most important holdings in *Hengle*.

10 Thank you, Your Honor.

11 THE COURT: All right. Would the plaintiff like to  
12 respond to that?

13 MR. MCANDREWS: Yeah. The issue of on- and  
14 off-reservation conduct is not an issue of this motion,  
15 because now we're getting in the substantive actual claims  
16 here which have not even been properly pled. So I do kind of  
17 caution the Court down this path that now we're talking about  
18 substantive law.

19 In regards to Mr. Williams, we're now talking about  
20 an issue that should be in front of the arbitrator. The  
21 arbitrator should be deciding whether or not on- or  
22 off-reservation conduct is subject to certain state laws.  
23 That can be for the arbitrator to decide.

24 Again, Your Honor, this is a Motion to Dismiss on  
25 whether or not even the claims have been properly pled or

Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/2022

1 they're the necessary parties. So even to get to that  
2 substantive, now we're talking about kind of what's going to  
3 happen in summary judgment if that case moves forward.

4 THE COURT: All right. No further argument, but  
5 plaintiffs' counsel mentioned wishing to amend. How much  
6 time do you need to file amendments?

7 MR. GUZZO: Twenty-one days, Your Honor.

8 THE COURT: Okay. We'll allow you 21 days to file  
9 any amendments. Defense counsel, let us know within -- how  
10 many days after that would you like to raise any other issues  
11 or file any other pleadings?

12 MR. MCANDREWS: Thank you, Your Honor. I'll let you  
13 know.

14 THE COURT: I mean, how many days would you like?

15 MR. MCANDREWS: Oh, if I could get 30.

16 THE COURT: Okay.

17 MR. MCANDREWS: I appreciate it.

18 THE COURT: All right. Well, 30 and 30 then. Thank  
19 you all very much. I appreciate you.

20 MR. MCANDREWS: Thank you, Your Honor.

21 MR. GUZZO: Thank you, Your Honor.

22 THE COURT: Thank you.

23 (Proceedings concluded at 3:15 p.m.)

24 CERTIFICATION

25 I certify that the foregoing is a correct transcript

Fitzgerald, et al v. Wildcat, et al - 3:20cv44 - Hearing Held 9/21/2022

1 from the record of proceedings in the above-entitled matter.

2

3

4

\_\_\_\_\_/s/\_\_\_\_\_  
\_\_\_\_\_

5

Cynthia L. Bragg

6

November 4, 2022

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

Cynthia L. Bragg, Official Court Reporter